United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

July 13, 1994

Memorandum

To: Ada E. Deer
Assistant Secretary -- Indian Affairs

From: John D. Leshy
Solicitor

Subject: Amendment of the Indian Reorganization Act

This responds to your request for my views on the meaning of Section 5(b) of the Technical Corrections Act of 1994 (Pub. Law 103-263; 108 Stat. 707) which amended Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 476, by adding two new subsections. The new subsections provide:

> (f) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; PROHIBITION ON NEW REGULATIONS.-Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
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> (g) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; EXISTING REGULATIONS.-Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on the date of enactment of this Act and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

These subsections were added to unrelated technical amendments on the Senate floor immediately prior to enactment. The only relevant legislative history is a colloquy

between Senators Inouye and McCain.[1] In proposing the amendment, Senator McCain stated:

> The purpose of the amendment is to clarify that section 16 of the Indian Reorganization Act was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes. In the past year, the Pascua Yagui [sic] Tribe of Arizona has brought to our attention the fact that the Department of the Interior has interpreted section 16 to authorize the Secretary to categorize or classify Indian tribes as being either created or historic.

140 Cong. Rec. S6147 (daily ed. May 19, 1994).

It is clear from their colloquy that Senators Inouye and McCain are referring to the interpretation in the Solicitor's Opinion dated April 15, 1936, styled "Sioux - Elections on Constitutions" (1 Op. Sol. on Indian Affairs 618 (U.S.D.I. 1979))("Opinion")[2]. The Opinion concluded that, in authorizing the adoption of tribal constitutions in Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 476, Congress distinguished between the governmental powers which may be exercised by, respectively, what have come to be known as "historic" tribes on the one hand, and "non-historic" or "created" tribes or adult Indian communities on the other. While not expressly using the term "non-historic" or "created" tribe, the Opinion referred to the latter as Indian "groups" which were "organized on the basis of their residence upon reserved land." Opinion, at 618.

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[1] These subsections were previously introduced in independent bills in the Senate (S. 2017) and House of Representatives (H.R. 4231) in mid-April. No action was taken on either bill. In remarks nearly identical to those he made upon introduction of the language added to the Technical Corrections Act, Senator McCain noted that the Department might take action on its own to modify its prior interpretation of section 16. 140 Cong. Rec. S4339 (daily ed. April 14, 1994). When he introduced H.R. 4231, Congressman Richardson made similar, albeit more brief, remarks. There is no other legislative history from the House.

[2] The same opinion appears with the heading "Powers of Indian Group Organized Under IRA But Not As Historical Tribe" as Solicitor's Opinion, April 15, 1938, 1 Op. Sol. on Indian Affairs 813 (U.S.D.I. 1979). The date of 1938 appears to be a typographical error, because the elections for the Lower Sioux Indian Community and Prairie Island Indian Community referred to in the opinion in the future tense were held on May 16 and 23, 1936, respectively.

As you know, my office was in the final stages of reviewing that Opinion, pursuant to your request, when Congress acted. Your January 1994 Senate testimony on the Pascua Yaqui legislation was sharply critical of the distinction.

The amendment, signed into law by President Clinton on May 31, 1994, overrules the 1936 Opinion.[3] You should therefore instruct the Bureau of Indian Affairs to place no reliance on it in future dealings with Tribes. You may also want to notify the Tribes that have previously been regarded as "created" of this change.

While my reconsideration of the Opinion is now moot, some discussion of it may be helpful to you in applying the new law. With little elaboration, the Opinion based its conclusion that the IRA authorized a distinction between "historic" and "non-historic" or "created" tribes on a single sentence found in Section 16 of the IRA.

Section 16 as originally enacted provided, in relevant part:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

The effect of the distinction drawn in the 1936 Opinion was that a community of adult Indians organized on reserved land under Section 16 of the IRA may not have certain sovereign powers enjoyed by other "historic" tribes, unless the powers have been delegated to the tribe by the Secretary of the Interior or are incidental to the tribe's ownership of the property or to the carrying on of business. The tribe's power to regulate law and order, for example, could only be sustained where there was a delegation of power from the Secretary of the Interior. Other powers possibly affected include the power to condemn land of community members, to regulate

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[3] The amendment, which was not provided to my Office in advance of its introduction, and upon which we had no opportunity to comment, is not merely a simple overruling of the 1936 Opinion, and Senator McCain made clear in his floor statement that its reach was not confined to the IRA. Instead, he characterized it as "intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify, or implement the categories or classifications." 140 Cong. Rec. S6147 (daily ed. May 19, 1994). This memorandum does not address other possible applications of the amendment beyond the 1936 Opinion.

inheritance of the property of community members, and to levy taxes upon community members and others.

The distinction drawn in the 1936 Opinion has had a limited practical effect. The occasions for applying it have been relatively infrequent; principally, in BIA review of tribal constitutions or constitutional amendments pursuant to Section 16.[4] In the nearly sixty years since the Opinion was issued, in fact, fewer than twenty of the more than 500 federally recognized tribes have received notice that their particular constitution or their exercise of constitutional powers might be impermissible because they were considered to be "created" rather than "historic" tribes.

The Opinion's impact has also been limited because it recognized that "created" tribes may exercise some of the powers listed above as incident to other powers they have that do not derive from sovereignty. As the Opinion put it: "The group . . . may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior." Opinion, at 618.

The underlying question is solely one of statutory interpretation -- of the meaning to be ascribed to this sentence in Section 16 of the IRA. In legislating in the arena of tribal powers, Congress can and sometimes has differentiated among the powers and authorities of tribes or Indian groups.[5]

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[4] In 1988 Congress amended Section 16 of the IRA to require the Secretary to hold elections on proposed new tribal constitutions and constitutional amendments within stated time periods. The 1988 amendments also required the Secretary to advise the tribe in writing 30 days prior to calling the elections of any provision which he found contrary to applicable law.

[5] Title 25 of the United States Code is replete with special legislation limiting or otherwise affecting the powers of individual tribes, such as the Navajos and the Hopis, or groups of tribes, such as the Five Civilized Tribes (Cherokees, Creeks, Chickasaws, Choctaws and Seminoles) or all those tribes in a particular state. For example, all matters involving tribal powers, immunities and jurisdiction of the Catawba Tribe are governed by a settlement agreement and the Congressionally sanctioned State Act (25 U.S.C. § 941h); Oregon has been granted civil and criminal jurisdiction within the boundaries of the Coquille Reservation (25 U.S.C. § 715d); New York has criminal jurisdiction on Indian reservations (25 U.S.C. § 232) and New York courts have civil jurisdiction (25 U.S.C. § 233); Kansas has criminal jurisdiction on Indian reservations (18 U.S.C. § 3243), see, Negonsott v. Samuels, ___ U.S. ___, 113 S.Ct. 1119 (1993); Maine has civil and criminal jurisdiction over reservations (25 U.S.C. § 1725); Texas has civil and criminal jurisdiction over the

While my office was reexamining this Opinion, our research into its history unearthed some interesting background; specifically, memoranda from two Assistant Solicitors taking contrary positions on the question shortly before the Opinion was released. In one, Charlotte Westwood argued that no distinction should be drawn, while in the other Felix Cohen, a pioneering figure in Indian law, argued for the distinction. In the end, the Solicitor sided with Cohen.[6] The two memoranda are attached for your information.

Notwithstanding the Solicitor's interpretation, the Opinion has come into serious question in recent times. For one thing, the distinction it drew is not based on the express terms of Section 16 of the IRA.[7] For another, it may also have been undercut by the 1988 amendments to Section 16. See Pub. L. No. 100-581, 102 Stat. 2938; in the following paragraph, the 1988 additions are shown in boldface and the deletions struck-through.

> (a) Any Indian tribe~~, or tribes, residing on the same reservation,~~ shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, **and any amendments thereto,** which shall become effective when --
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> (1) ratified by a majority of the adult members of the tribe, or **tribes** ~~of the adult Indians residing on such reservation, as the case may be,~~ at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe~~.~~**;**

Section 19 of the IRA defines "tribe" to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." The definition was not changed by the 1988 amendments. The legislative history of the 1988 amendments simply notes:

Ysleta Del Sur Pueblo (25 U.S.C. § 1300g-4(f)).

[6] But see the statements of Senators McCain and Inouye in introducing the recent amendment on the Senate floor. 140 Cong. Rec. S1646 (daily ed. May 19, 1994).

[7] After nearly sixty years of relative obscurity, this Opinion has, as you know, recently gained a surprising amount of attention. A front-page article in the April 4, 1994, Seattle Post-Intelligencer, for example, quoted tribal officials and attorneys who characterized the Opinion in strongly negative and sweeping terms; e.g., that it "came out of nowhere," was "just wrong, historically," and could be applicable to more than 200 tribes.

> The amendment deletes reference to residence on a reservation and eliminates reservation status or ownership of a tribal land base as a condition precedent to organization under this Act.
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> The Committee's deletion of the references to the rights of Indians residing on the same reservation to organize under the 1934 Act does not alter the authorities with respect to the organization of such Indians because of the definition of "tribe" in section 19 of the 1934 Act (25 U.S.C. 479) which includes "the Indians residing on one reservation." In the case of such a "tribe" the members of the tribe are the residents of the reservation.

S. Rep. No. 100-577, 100th Cong., 2d Sess. 2 (1988).

Moreover, the modern trend of Federal statutes affecting Indian tribal governmental powers on a national basis is to define "tribe" in broad terms. See, e.g., the definition in the Indian Civil Rights Act of 1968: "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government." 25 U.S.C. § 1301(1). See also, the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801(5).

Congress effectively limited or partially overruled the 1936 Opinion in the Indian Land Consolidation Act by defining "tribe" to mean "any Indian tribe, band, group, pueblo or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). The power to regulate inheritance of property of community members was one of the sovereign powers not vested in "created" or "non-historic" tribes, according to the 1936 Opinion, but the Land Consolidation Act authorizes any Indian tribe so broadly defined, subject to approval of the Secretary, to "adopt its own code of laws to govern descent and distribution of trust or restricted lands within that tribe's reservation or otherwise subject to that tribe's jurisdiction." 25 U.S.C. § 2205(a).

The Indian Child Welfare Act defines "tribe" to mean: "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in Section 1602(c) of Title 42." 25 U.S.C. § 1903(8). The Indian Self-Determination and Education Assistance Act, one of the more important pieces of Indian legislation in the last 20 years, defines Indian tribe to mean:

> [A]ny Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

25 U.S.C. § 450b(b). See also, the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(10).

As these varied yet uniformly sweeping statutory definitions of "tribe" make clear, Congress has long been aware of the ethnological, cultural and historic differences among Indian governance organizations, yet Congress for the most part makes no distinctions among tribes in recognizing their existing authorities or vesting them with new ones. But see footnote 5, above. In any event, apart from these specific statutory modifications, Congress has now settled the debate by rejecting the distinction drawn in the 1936 Opinion.

There remains the question of how the recent amendment is to be implemented with respect to tribes heretofore regarded as "created," whose constitutions contain limitations based upon the 1936 Opinion. The need for and the process to be employed in amending these constitutions may raise legal issues that will have to be addressed in my office. I believe the best course is to await a specific factual context before attempting to resolve any such issues. Please consult my office when such requests for amendments are made.

Attachments

cc: Associate Solicitors
All Regional and Field Solicitors